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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 64

MADELEINE URSULA SNYDER,

Petitioner,

vs.

REAR ADMIRAL W. A. BUCK, PAYMASTER GENERAL OF THE NAVY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR MADELEINE URSULA SNYDER

JOHN GEYER TAUSIG,
GIBBS L. BAKER,
Attorneys for Madeleine Ursula Snyder,
Continental Building,
Washington 5, D. C.

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Opinions Below

The opinion of the United States District Court for the District of Columbia (R. 26-36) is reported at 75 F. Supp. 902. The per curiam order of the United States Court of Appeals for the District of Columbia Circuit (R. 46, 47), vacating the District Court judgment against Rear Admiral W. A. Buck, Paymaster General of the Navy and directing the dismissal of the complaint as abated, is not reported.

Jurisdiction

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, § 39, 62 Stat. 992, 28 U. S. C. A. 1254.

Question Presented

Does Section 11 of the Act of February 13, 1925 cause the abatement of a money judgment entered in the form of a mandatory injunction by the District Court against a Paymaster General of the Navy, when he resigns from office subsequent to the entry of that judgment, when his successor in office is not substituted as a party defendant in the District Court within six months after the resignation, and when no valid appeal is taken from the District Court judgment.

Statute Involved

Section 11 of the Act of February 13, 1925, 43 Stat. 941, 28 U. S. C. A. 780(a) provides in pertinent part:

> "Sec. 11(a) That where, during the pendency of an action, suit or other proceeding brought by or against an officer of the United States, * * *, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

Statement of the Case

Madeleine Ursula Snyder, as widow of Charles R. Snyder, deceased naval officer, brought an action in the United

States District Court for the District of Columbia to compel Rear Admiral W. A. Buck, Paymaster General of the Navy, to pay her the six months death gratuity provided by the Act of May 28, 1928, 45 Stat. 710, as amended, 34 U. S. C. A. 943 (R. 1-3). In due time the defendant filed an answer to the complaint (R. 4, 5).

After a trial without a jury, the District entered a final judgment in the form of a mandatory injunction against Rear Admiral W. A. Buck, Paymaster General of the Navy, directing him to pay Madeleine Ursula Snyder the six months death gratuity in the amount of $1,365.00. *This final judgment was entered on January 30, 1948*[1] (R. 40, 41).

On March 18, 1948, Rear Admiral W. A. Buck, purporting to act in the official capacity of Paymaster General of the Navy, filed Notice of Appeal from the District Court's final judgment (R. 41). Thereafter, purporting to act in the same official capacity, he filed a Designation of record (R. 42), had the record printed and transmitted to the Court of Appeals for the District of Columbia Circuit (R. 43) and filed a Brief for Appellant. In due time Madeleine Ursula Snyder filed Brief for Appellee.

Oral argument of the Appeal of Rear Admiral Buck in the official capacity of Paymaster, was scheduled for *March 18, 1949*. At that time and without prior actual or constructive notice to the Court of Appeals or to the Appellee, Rear Admiral Buck orally suggested to the Court that the action, including the final judgment of the District Court, had abated by reason of the fact that *he had resigned from the office of Paymaster General of the Navy on March 1, 1948* and on that date had been succeeded by Rear Admiral Edwin D. Foster and no motion had been made pursuant to Rule 28(b) of the Court of Appeals and Section 11 of the Act of February 13, 1925, 43 Stat. 941, 28 U. S. C. A.

[1] All emphasis throughout this Brief is supplied by Petitioner.

780(a) to substitute Rear Admiral Foster as Appellant in this case within six months from the date Rear Admiral Buck resigned from the office of Paymaster. Subsequently this suggestion of abatement was set forth in a written memorandum which was filed with the Court of Appeals (R. 44-46).

Upon the authority of *Defense Supplies Corp.* v. *Lawrence Warehouse Corp.*, 336 U. S. 631, "particularly that portion of the opinion dealing with *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590," the Court of Appeals held that under the provisions of Section 11 of the Act of February 13, 1925 the "failure to substitute appellant's successor" caused the action to abate.

The mandate was stayed in the Court of Appeals; Madeleine Ursula Snyder filed a motion for leave to proceed herein in forma pauperis and a petition for writ of certiorari, both of which were granted by this Court (R. 49).

Specification of Errors

The Court of Appeals erred:

(1) In holding that the validity of the District Court judgment in the case at bar was conditional upon substitution of Rear Admiral Buck's successor in the office of Paymaster General of the Navy in accordance with the provisions of the Act of February 13, 1925 and that the failure to make such substitution caused the District Court judgment to abate.

(2) In determining that principles of estoppel did not foreclose Rear Admiral Buck's attack under the Act of February 13, 1925 upon Madeleine Ursula Snyder's failure to substitute his successor.

(3) In failing to hold that Rear Admiral Buck had no right to invoke a review of the District Court judgment

after the termination of his incumbency in the office of Paymaster General of the Navy and in failing to dismiss his appeal and to remand the case to the District Court so that Madeleine Ursula Snyder could bring action on the District Court judgment.

Summary of Argument

The final money judgment which the District Court entered in the form of a mandatory injunction against Rear Admiral W. A. Buck, in his capacity as Paymaster General of the Navy, would not have abated at common law by reason of his resignation from office after the entry of the judgment.

The legislative history of the Act of February 13, 1925 shows that Congress enacted this legislation to ameliorate the harshness of the common law and did not intend thereby to add to the inequities of the common law by providing a statutory procedure for the abatement of judgments which did not abate at common law. Furthermore, the language used by Congress in enacting this statute establishes that Congress was dealing therein only with pending actions and was not concerned with causes of action which were no longer pending because of their merger in final judgments.

This Court did not hold in *Defense Supplies Corp.* v. *Lawrence Warehouse Co., supra*, that the validity of a judgment, which would not have abated at common law, was made conditional upon substitution in compliance with the Act of February 13, 1925.

Moreover, the Act of February 13, 1925 has no application to the case at bar, because the Act applies only to cases in which an officer of the Government dies or is otherwise separated from office during the "pendency of an action" in a court of first instance or in an appellate tribunal. The

case at bar was not "pending" within the meaning of that word as used in the Act in either the District Court or in the Court of Appeals when Rear Admiral Buck resigned from the office of Paymaster General of the Navy on March 1, 1948.

Even if the Act of February 13, 1925 is applicable to the case at bar, principles of estoppel foreclose Rear Admiral Buck's attack upon Madeleine Ursula Snyder's failure to substitute his successor in office.

ARGUMENT

I

The District Court Judgment Would Not Have Abated at Common Law

In *Secretary* v. *McGarrahan*, 9 Wall. 298, it was held that at common law a judgment in mandamus ordering the performance of an official duty by a public officer, as if yet in office, when in fact he had gone out after service of the writ, and *before the judgment* is void, and cannot be executed against his successor. This doctrine was reaffirmed in *United States* v. *Boutwell*, 17 Wall. 604, wherein Justice Strong explained the grounds for the doctrine, namely that what the law seeks to enforce by writ of mandamus is the personal obligation of the individual to whom it addresses the writ; he alone can be punished for disobedience; and, if he be a public officer, the court cannot compel him to perform a personal duty after his power to perform has ceased by reason of his retirement from office.

However, these cases do not hold that a judgment in mandamus ordering the performance of an official duty by a public officer abated under common law, when said judgment was entered before he retired from office. Indeed, in the light of Justice Strong's reasons for holding that an

action at law for a writ of mandamus must abate when the judgment is entered against the public officer after he has retired from office, it can be seen that there is no valid ground for holding that a judgment in mandamus entered before his retirement must abate, when his power to comply with the directions of the court is not affected by his subsequent retirement.

A study of other decisions of this Court on the question of abatement at common law, including the decisions in *United States* v. *Chandler*, 122, U. S. 643; *United States ex rel. Long* v. *Lochren*, 164 U. S. 701; *Warner Stock Valley Co.* v. *Smith*, 165 U. S. 28; *United States ex rel Bernardin* v. *Butterworth*, 169 U. S. 600, does not disclose that this Court has ever held that a judgment in mandamus entered against a public officer before his death or retirement from office was in any way affected at common law by his subsequent death or retirement. None of these cases involve a judgment entered *against* an officer of the Government prior to his death or resignation from office. All of these cases, as well as the cases of *Irwin* v. *Wright*, 258 U. S. 219, *United States ex rel. Claussen* v. *Curran, supra, Matheus* v. *U. S. ex rel. Cunningham*, 282 U. S. 802; and *United States ex rel. Trinler* v. *Carusi*, 168 F.(2) 1014, which were decided under the Act of February 8, 1899, c. 121, 30 Stat. 822, 28 U. S. C. A. 780, or the Act of February 13, 1925 or a rule of court based thereon, involve the death or resignation of an officer of the Government after the action brought against him had been dismissed, that is after judgment had been entered in favor of the officer-defendant. In such cases the cause of action was not merged in the final judgment at common law. 1 C. J. S. Section 128 and 1 C. J. Section 289 and cases cited therein under Footnote 71, especially *Iron Gate Bank* v. *Brady*, 184 U. S. 665.

On the other hand, numerous decisions of other courts

support the doctrine that, at common law the death or retirement from office of a public officer-defendant after judgment had been entered against him did not abate the action because the cause of action had been merged in a final judgment which stood and would not be vacated. 1 C. J. S Section 124 and 127; 1 C. J. Section 288 and cases cited therein under Notes 65, 66.

From the foregoing it appears that, at common law the District Court judgment, which was entered on *January 30, 1948* in the form of a mandatory injunction against the defendant, Rear Admiral Buck, Paymaster General of the Navy, and which directed the defendant to pay plaintiff $1,365.00, would not have abated by reason of his retirement from office on *March 1, 1948*. Certainly, his retirement from the office of Paymaster has not affected his power to comply with the directions of the District Court and has not made it impossible for him to perform the personal duty the mandatory injunction seeks to enforce, to wit, the payment by him of a money judgment in the amount of $1,365.00.

Furthermore, Rear Admiral Buck cannot be heard to say that it would be an unjust penalty to compel him to make this payment from his own pocket, for he had ample time from the date of the entry of judgment, January 30, 1948, to the date of his resignation from office March 1, 1948, to make payment from the funds provided by Congress for this purpose, or to otherwise protect himself from the consequences of his failure to comply with the mandatory injunction.

II

The Act of February 13, 1925 Does Not Cause Abatement of Judgments Which Did Not Abate at Common Law

In *United States ex rel. Bernardin* v. *Butterworth, supra*, this Court held that at common law a suit for a writ of

mandamus to compel the Commissioner of Patents to issue a patent abates by the death of the Commissioner and cannot be revived so as to bring in his successor, although the latter gives his consent. At the conclusion of its opinion, this Court said:

> "In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, *in the case of suits against the heads of departments abating by death or resignation,* it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method."

As suggested by this Court, Congress provided for this difficulty by enacting the Act of February 8, 1899, 30 Stat. 822, 28 U. S. C. A. 780. *Murray* v. *Utter,* 186 U. S. 95, 46 L. Ed. 1070, 22 S. Ct. 776.

When this Court suggested that "it would *promote justice* to enlarge the scope of the Act of February 8, 1899 so as to permit the substitution of successors for state officers suing or sued in the federal courts, who cease to be officers by retirement or death," Congress so amended the Act by the Act of February 13, 1925. *Irwin* v. *Wright,* 258 U. S. 219, 66 L. Ed. 573, 42 S. Ct. 293.

The motivation behind this legislation makes it evident that Congress only intended thereby to ameliorate the harshness of the common law, by providing a statutory procedure to avoid the abatement of those causes of action brought by or against public officers which abated at common law by reason of their death or resignation. Certainly, it was not the intent of Congress to *promote injustice* by adding to the inequities of the common law a statutory procedure for the abatement of those causes of action, which were no longer *pending* because of their merger in final

judgments against public officers and which for this reason did not abate at common law upon the public officer's subsequent death or retirement.

From the foregoing it becomes apparent that the language used by Congress in the Act of February 13, 1925 must be carefully interpreted in the light of the intent Congress had in enacting this legislation and in enacting the Act of February 8, 1899 which it amended. By the language of the amendment Congress authorized the Court wherein the action is *pending*, to permit a cause of action to be continued and maintained "where during the *pendency of an action*, suit, or other proceeding * * * such officer dies, resigns, or otherwise ceases to hold office * * *". This language leaves no doubt that Congress was dealing in this legislation only with *pending actions* and that the Act did not encompass a cause of action which was no longer pending because of its merger in a final judgment. On the basis of this proper interpretation, it may be stated with assurance that the language used by Congress in the Act of February 13, 1925 does not compel a result contrary to the intent of Congress in enacting this legislation and that the Act does not cause abatement of judgments which did not abate at common law.

III

This Court Did Not Decide in Defense Supplies Corp. v. Lawrence Warehouse Co. That the Act of February 13, 1925 Causes Abatement of Judgments Which Did Not Abate at Common Law.

Upon the authority of this Court's opinion in *Defense Supplies Corp.* v. *Lawrence Warehouse Co., supra*, "particularly that part of the opinion dealing with *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590 (1928)", the United States Court of Appeals for the District of Columbia Circuit held the case at bar had abated and that the judgment

of the District Court entered prior to Rear Admiral Buck's resignation from office must be vacated. In so holding the Court of Appeals misinterpreted and did not give proper effect to applicable decisions of this Court.

In the light of the motivating force behind the Act of February 8, 1899, it is evident that when Congress provided therein "no action shall abate", it was referring *to those actions which at common law abated* by reason of the death or resignation of an officer of the United States. By that Act Congress precluded such common law abatement and authorized the Court to allow the action "to be maintained by or against his successor in office" if within 12 months after the death or resignation of the officer of the United States "a necessity for the survival thereof" was shown by a motion or supplemental petition. This Court so interpreted that Act in *LeCrone* v. *McAdoo*, 253 U. S. 217, for in that case it was held that although the action could not be continued in this Court when the required substitution had not been accomplished and "the year given for substitution had expired", nevertheless, the judgments of the District Court and Court of Appeals did not abate. Since the judgments of the District Court and Court of Appeals were rendered for the defendant and dismissed the plaintiff's petition and denied the writ of mandamus prayed for therein, they were judgments which would have abated at common law even though rendered prior to Mr. McAdoo's resignation from the Office of Secretary of the Treasury. This is so, for as shown above the cause of action in this Court was that on which the suit was originally founded, inasmuch as the nature of the judgments below did not enable the cause to be merged therein.

In the light of the motivating force behind the amendment to the Act of February 8, 1899, it is evident that when Congress enacted the Act of February 13, 1925 and omitted the

command "no action shall abate" it was again referring to those actions, which at common law abated by reason of the death or resignation of an officer of the United States or of an officer of a state of the United States. By the amendment Congress provided that such common law abatement could only be precluded by strict compliance with the remedial procedure provided in the amendment, namely the substitution of his successor in office within 6 months after his death or separation from office. This Court so interpreted the amendment in *United States ex rel. Claussen* v. *Curran, supra,* for in that case it was held that because of the failure to substitute Curran's successor in office within 6 months after Curran's resignation, the District Court judgment for defendant Curran, which dismissed the plaintiff's petition and denied the writ of habeas corpus prayed for therein had abated although it was entered prior to Curran's resignation. As explained above the District Court judgment in the *Curran* case was one that would have abated at common law and would not have abated under the Act of February 8, 1899. As fully explained in Point II of this brief, the Act of February 13, 1925 did not go so far as to cause abatement of judgments which did not abate at common law. Accordingly, by pointing out in the *Defense Supplies Corp.* case that it had vacated the judgment rendered by the District Court in the *Curran* case because the Act of February 13, 1925 "made it unmistakably clear that the validity of the judgment was conditional upon substitution" this Court may not properly be held to have decided that the Act of February 13, 1925 makes the validity of judgments which did not abate at common law "conditional upon substitution." The Court of Appeals for the District of Columbia Circuit erred in so holding.

In *Bowles* v. *Wilke,* 175 F. (2d) 35, the Court of Appeals for the 7th Circuit commented upon the decision in *North-*

western Lumber and Shingle Co. v. *U. S.*, 170 F. (2d) 692, and in so doing correctly construed the decision of this Court in the *Defense Supplies Corp.* case. In the *Northwestern* case, Paul A. Porter, Price Administrator, had obtained a money judgment against the Lumber and Shingle Company for violation of price regulations, including Section 9 of Revised Maximum Price Regulation No. 164. However, in accordance with a stipulation entered into between the parties, execution on the judgment was stayed until the final determination of *Reser* v. *Fleming*, 160 F. (2d) 378. On December 12, 1946 Porter was succeeded in office by Philip B. Fleming. The issues in *Reser* v. *Fleming, supra,* were finally determined within six months of the aforesaid succession in office, but no motion was made under Paragraph (d) of Rule 25 of the Federal Rules of Civil Procedure to make substitution for Porter as the party plaintiff in the *Northwestern* case. Accordingly, the Lumber and Shingle Co. moved to dismiss the judgment against it as abated, but the Court held that noncompliance with Rule 25(d) would not abate the action.[2] The Court of Appeals for the 7th Circuit in *Bowles* v. *Wilke, supra,* upon the authority of the Supreme Court's decision in the *Defense Supplies Corp.* case, reached the conclusion that the decision on the abatement question in the *Northwestern* case was correct, because the judgment there was valid when entered and remained valid irrespective of anything that happened thereafter. It is submitted that that conclusion was correct because the nature of the judgment in the *Northwestern* case was such that it merged the cause of action therein.

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[2] Rule 25(d) and Section 11 of the Act of February 13, 1925 are identical insofar as the issues involved in the *Northwestern* case and the case at bar are concerned.

IV

In Any Event the Act of February 13, 1925 Is Not Applicable to the Case at Bar

If it is assumed *arguendo*, that the Act of February 13, 1925, goes so far as to make the validity of any judgment, including a judgment which did not abate at common law, conditional upon substitution when the case of which such judgment is a part continues to be a *pending* one in a court of first instance or in an appellate tribunal, nevertheless the Act is not applicable to the case at bar. This is true, because the case at bar was not *pending* either in the District Court or in the Court of Appeals when Rear Admiral Buck resigned from office on March 1, 1948 and it was not *pending* in either court at any time after his resignation.

In *Davis* v. *Preston*, 280 U. S. 406, 74 L. Ed. 514, 50 S. Ct. 171, this Court held that a writ of certiorari to review a judgment recovered against a public officer in his official capacity, petitioned for by him after termination of his incumbency, must be dismissed as having been improvidently granted, all right to complain of the judgment, or discretion to invoke a review of it, having passed to his successor in office. This Court also held therein that the successor in office of a public officer against whom a judgment has been recovered may not be substituted for him as petitioner for a writ to review such judgment, where the writ was sued out after the succession in office, and the time within which review may be invoked has expired. The *Davis* case doctrine was reaffirmed by this Court in *Nudelman* v. *Globe Varnish Company*, 312 U. S. 690, 85 L. Ed. 1126, 61 S. Ct. 621.

It follows that when Rear Admiral Buck resigned from the office of Paymaster General of the Navy on March 1, 1948 and was succeeded in that office on that date by Rear

Admiral Foster, all right to complain of the District Court judgment of January 30, 1948 against Rear Admiral Buck in his official capacity and the discretion to invoke a review of such judgment on appeal passed to the successor, Rear Admiral Foster. Also, it follows that when the Notice of Appeal was filed by Rear Admiral Buck on March 18, 1948, 18 days after the succession in office, he had no authority to invoke an appeal and since no motion to substitute his successor in office as the appellant was made until March 18, 1949, long after the statutory period had expired within which review on appeal could be invoked, the Court of Appeals could not grant the motion. Therefore, no valid appeal from the District Court judgment was ever filed in the Court of Appeals.

The foregoing establishes beyond a shadow of a doubt that Rear Admiral Buck did not resign from the office of Paymaster General of the Navy "during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States * * * [in] an appellate tribunal" and, insofar as the application of the Act of February 13, 1925 is limited to "*pending*" proceedings in an appellate tribunal, the Court of Appeals erroneously decided that said Act required the abatement of "the District Court judgment on appeal" and that the abatement robbed the District Court judgment of its vitality. Obviously, since there never was an appeal in the case at bar, there were no appellate proceedings which could abate.

It also appears that Rear Admiral Buck did not resign from office "during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States * * * [in] a court of first instance". As previously mentioned the judgment of the District Court was entered on *January 30, 1948* and Rear Admiral Buck did not resign from office until *March 1, 1948*. This judgment in the form of a mandatory injunction became final

on the date of its entry, for the District Court did not stay the judgment. Rule 62(a) Federal Rules of Civil Procedure. Even if the judgment had been stayed, the stay would have been conditional upon perfecting the appeal. *Defense Supplies Corp.* v. *Lawrence Warehouse Co., supra,* and as shown above an appeal from the final judgment was never taken.

Black's Law Dictionary (Second Edition) defines "pending" as follows:

> "Begun but not yet completed; unsettled; undetermined; in process of settlement or adjustment. Thus an action or suit is said to be pending from its inception *until the rendition of a final judgment.*"

If Congress did not in the Act of February 13, 1925 use the word "*pending*" in the common law connotation explained in Point II of this brief, then it must have used the word with the meaning given to it by Black. For it is difficult to conceive that after the rendition of a final judgment by the District Court, that there could be a substantial need for "obtaining an adjudication of the questions involved" in the District Court.

If the Act of February 13, 1925 is Applicable to the Case at Bar, Principles of Estoppel Foreclose Respondent's Attack upon the Failure to Substitute.

If it is assumed *arguendo* that at the time Rear Admiral Buck resigned from the office of Paymaster, the case at bar was "a pending action" within the meaning of the Act of February 13, 1925, nevertheless it does not follow that the District Court judgment must be vacated. For in Footnote 10 to its opinion in *Defense Supplies Corp.* v. *Lawrence Warehouse Co., supra,* this Court stated:

> "The view we take of this case makes it unnecessary to decide whether principles of estoppel might not

foreclose respondent's attack upon the failure to substitute."

All of the opinions of this Court which are reviewed herein and the footnote quoted above, make it clear that this Court has not decided the question whether principles of estoppel might foreclose an attack upon the failure to substitute within the time specified in the Act of February 13, 1925. In applying this statute of the United States to the case at bar, the United States Court of Appeals for the District of Columbia Circuit decided this question in the negative. A Statement of the pertinent facts in the case, without any supporting argument, is sufficient to establish that the question is one of substance which should be settled by this Court.

The District Court final judgment, in the form of a mandatory injunction, was entered on *January 30, 1948*. Without actual or constructive notice to Madeleine Ursula Snyder, Rear Admiral Buck resigned from the office of Paymaster General of the Navy on *March 1, 1948* and was succeeded on that date by Rear Admiral Foster. On *March 18, 1948*, 18 days after he had resigned from the Office of Paymaster and had lost his right of appeal in the capacity of Paymaster, Rear Admiral Buck purported to note and subsequently perfect an appeal as Paymaster General of the Navy and thereby wilfully misled the Courts and Madeleine Ursula Snyder to believe that he continued to hold the office of Paymaster.

The Court of Appeals scheduled the oral argument on the merits of this appeal for *March 18, 1949*. On that date Rear Admiral Buck disclosed the deception he had successfully carried out for one year. He contended that as a result of Madeleine Ursula Snyder's failure to substitute his successor in office, which failure was brought about by his deception, the District Court judgment, which was valid when

entered and which was entered while Rear Admiral Buck occupied the office of Paymaster, was robbed of its vitality by the abatement of appellate proceedings. Madeleine Ursula Snyder contended that principles of estoppel foreclosed Rear Admiral Buck's attack upon her failure to substitute his successor in office. The Court of Appeals rejected this contention and held that her failure to substitute his successor in office caused the case to abate and directed the District Court to vacate its judgment.

In *Galt* v. *Phoenix Indemnity Co.*, 74 App. D. C. 156, 120 F. (2) 723, the United States Court of Appeals for the District of Columbia Circuit quoting from the decision of this Court in *Davis* v. *Wakelee*, 156 U. S. 680, 689, 39 L. Ed. 578, 15 S. Ct. 555, 558 had this to say about the doctrine of equitable estoppel:

> "* * * where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. "* * * and, in order that the rule shall operate, it is necessary that the parties be the same, and the issues the same. In addition, the party urging the estoppel 'must show that he has done something or omitted to do something in reliance upon the other party's conduct by which he will now be prejudiced if the facts are shown to be different from those upon which he relied' * * * Where the parties have equal knowledge or opportunity of knowledge, or where the facts are known equally to both, or both have equal means of ascertaining them, there can be no estoppel."

An examination of the facts in the case at bar in the light of the definition given to "equitable estoppel" by the Court of Appeals in the *Galt* case, discloses that all of the elements of equitable estoppel are present here. It

therefore follows that the Court of Appeals must have determined that, principles of estoppel may not foreclose an attack upon the failure to substitute within the time specified by the Act of February 13, 1925. It is respectfully submitted that if for no other reason than *in the interest of justice*, this Court should determine that principles of estoppel may foreclose an attack upon the failure to substitute within the time specified by the Act of February 13, 1925 and that such principles do foreclose Rear Admiral Buck's attack upon Madeleine Ursula Snyder's failure to substitute his successor in office.

VI

28 U.S.C.A. 2105 Does Not Preclude Reversal by This Court of the Error Committed by the Court of Appeals in Ruling upon the Abatement Question.

In Rear Admiral Buck's brief in opposition to the granting of the petition for a writ of certiorari herein, he contended that the Act of June 25, 1948 c. 646, 62 Stat 963, 28 U. S. C. A. 2105, prevents review by this Court of the decision of the Court of Appeals on the abatement question involved herein. That Act provides:

> "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling on matters in abatement which do not involve jurisdiction."

The short answer to Rear Admiral Buck's contention is found in *Defense Supplies Corp.* v. *Lawrence Warehouse Co., supra,* in which this Court, on April 18, 1949, reversed an error made by the Court of Appeals for the 9th Circuit in ruling upon matters in abatement. In the *Defense Supplies Corp.* case this Court said:

> "We have held, above, that the Court of Appeals had no jurisdiction to review the merits. LeCrone and

> Payne show that we likewise had no jurisdiction so far as the merits are concerned. But that, of course, does not affect our power to set aside the erroneous action of the Court of Appeals. Our supervisory appellate jurisdiction would be of little value if the injustice caused by the decision below were to stand uncorrected. We are not so constricted."

Furthermore, the decisions of this Court in *Davis* v. *Preston, supra,* and *Nudelman* v. *Globe Varnish Co. supra* show that the Court of Appeals had no jurisdiction to rule upon matters in abatement in the case at bar. Accordingly, the error made by the Court of Appeals in ruling upon the matters in abatement herein does involve the jurisdiction of the Court of Appeals and 28 U. S. C. A. 2105 is not applicable.

VII

This Court Should Vacate the Judgment of the Court of Appeals and Remand to that Court With Directions to Dismiss the Appeal from the Judgment of the District Court.

In Rear Admiral Buck's brief in opposition to the granting of a petition for writ of certiorari herein, it is contended that this is not the type of case in which the Supreme Court should exercise its supervisory appellate jurisdiction in order to reverse the error made by the Court of Appeals in ruling upon the question of abatement, because such action would simply result in having the case remanded to the Court of Appeals for a decision on the merits and because the Court of Appeals has in a companion case, *United States* v. *Snyder,* 177 F. (2d) 44, decided issues on the merits adversely to Madeleine Ursula Snyder. This contention has no foundation either in law or in fact.

Since Rear Admiral Buck filed notice of appeal from the District Court judgment after termination of his incum-

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 64

MADELEINE URSULA SNYDER, PETITIONER

v.

REAR ADMIRAL W. A. BUCK,
PAYMASTER GENERAL OF THE NAVY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 26-36) is reported at 75 F. Supp. 902. The *per curiam* order of the United States Court of Appeals for the District of Columbia Circuit (R. 46), vacating the judgment of the district court and directing the dismissal of the complaint as abated, is reported at 179 F. 2d 466.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was en-

[1] An earlier opinion of the court of appeals in a companion case involving the same issues on the merits, not reached in the instant action, is reported at 177 F. 2d 44. See *infra*, pp. 7-8.

tered on November 16, 1949 (R. 46). The petition for a writ of certiorari was filed on December 30, 1949, and was granted on May 8, 1950 (R. 49). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). For the reasons set forth in Point II, infra, pp. 43-46, we suggest that there may be no jurisdiction over this case.

QUESTIONS PRESENTED

1. Whether the failure to substitute a successor Paymaster General of the Navy, within six months after he takes office, as required by Section 11 of the Judiciary Act of 1925, abates a mandatory injunction action against his predecessor, where the six-month period began after a district court judgment had been entered against the predecessor and ended while an appeal was pending from that judgment.

2. Whether the decision of the court below is a ruling in abatement which 28 U. S. C. 2105 precludes this Court from reversing.

STATUTES INVOLVED

Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941)[2] provides in pertinent part:

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[2] Section 11 was repealed as of September 1, 1948 (62 Stat. 992, 1000). That date coincides with the date on which the six-month statutory period for substitution in this case expired, that is, six months after Rear Admiral Buck's retirement on March 1, 1948 (R. 45). The repealing Act expressly preserved any rights or liabilities existing under any of the laws repealed by that Act (62 Stat. 869, 992). The repeal

SEC. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

* * * * *

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

28 U.S.C. 2105 (62 Stat. 963) provides:

Scope of Review; abatement. There shall be no reversal in the Supreme Court or a court

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of Section 11 does not, therefore, appear to affect the instant case.

bency in the office of Paymaster General of the Navy and since his successor in office did not move to be substituted for Rear Admiral Buck as appellant until long after the time within which the appeal could be taken, the Court of Appeals was without jurisdiction to review the merits of the cause and reversal of its decision on the abatement question cannot give it such jurisdiction. *Davis* v. *Preston, supra, Nudelman* v. *Globe Varnish Co., supra.*

In answer to the same or similar contentions in *Defense Supplies Corp.* v. *Lawrence Warehouse Co., supra,* this Court said:

> "Three conclusions follow * * *. The first is that the Court of Appeals was without jurisdiction to review the merits of the cause, since respondents called for review after the period given for substitution had expired. In addition, the District Court judgment was valid when entered, since it was entered during the one year period. And finally the judgment was not robbed of its vitality by the abatement of appellate proceedings."

Having reached these three conclusions the Supreme Court thereupon vacated the judgment of the Court of Appeals in the *Defense Supplies Corp.* case and remanded to that Court with directions to dismiss the appeal from the judgment of the District Court, so that action could be brought on the District Court judgment. It is evident that that is the procedure that this Court will direct in the case at bar.

Furthermore the decision of the Court of Appeals in *United States* v. *Snyder, supra,* did not decide the issue on the merits in the case at bar. In *United States* v. *Snyder, supra,* the Court of Appeals simply decided that Madeleine Ursula Snyder was not the *de jure* wife of Charles R. Snyder, deceased, and that therefore she was not within the restricted class of beneficiaries permitted by the National

Life Insurance Act. While the District Court held in the case at bar that the petitioner was the *de jure* wife of the decedent and therefore qualified for the death gratuity of the Act of May 22, 1928, 34 U. S. C. A. 943, there was a substantial question, which was briefed by both parties in the Court of Appeals, as to whether the Act of May 22, 1928 authorized the payment of the death gratuity to Madeleine Ursula Snyder because of her mere "relationship" as *de facto* wife of the decedent. Accordingly, it appears that Rear Admiral Buck is not even justified in asserting that if the Court of Appeals had jurisdiction to decide the case at bar on its merits, it would decide the issues against Madeleine Ursula Snyder.

Conclusion

For the foregoing reasons it is respectfully submitted that this Court, in the exercise of its supervisory appellate jurisdiction, should correct the injustice caused by the decision below by vacating the judgment of the Court of Appeals and remanding the case to that Court with directions to dismiss the appeal from the judgment of the District Court so that Madeleine Ursula Snyder may bring action on the District Court judgment.

Respectfully submitted,

JOHN GEYER TAUSIG,
GIBBS L. BAKER,
Attorneys for Madeleine Ursula Snyder.

Continental Building,
Washington, D. C.